COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1069

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RHONDA NEFF AND RANDY NEFF,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

JAMES PIERZINA, WILSON MUTUAL INSURANCE COMPANY, ANTON JOHNSON, D/B/A T.J. DOC'S, WEST CENTRAL MUTUAL INSURANCE AND DAVID SCHIESL,

DEFENDANTS-CROSS-RESPONDENTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Rhonda and Randy Neff appeal a judgment concluding that an American Family Mutual Insurance Company policy issued to David Schiesl does not provide coverage for their claims because American Family was prejudiced by Schiesl's failure to provide timely notice of the accident and the lawsuit.[1] They argue that American Family was not prejudiced as a matter of law or, alternatively, that the finding of prejudice is clearly erroneous. Because we conclude that the Neffs failed to overcome the presumption of prejudice, we affirm the judgment.

¶2 The parties note some inconsistency regarding the standard of review on the issue of prejudice. Several cases suggest that it is a question of fact that will not be overturned unless it is clearly erroneous. *See* ***Ehlers v. Colonial Penn Ins. Co.***, 81 Wis. 2d 64, 72, 259 N.W.2d 718 (1977); ***City of Edgerton v. General Cas. Co.***, 172 Wis. 2d 518, 556, 493 N.W.2d 768 (Ct. App. 1992) (*aff'd in part and rev'd in part on other grounds)* 184 Wis. 2d 750, 517 N.W.2d 463 (1994). Another case holds that the issue of prejudice presents a mixed issue of fact and law, in which we will uphold the trial court's factual determinations unless they are clearly erroneous, but will review de novo whether those findings fulfill a legal standard of prejudice. *See* ***Rentmeester v. Wisconsin Lawyers Mutual Ins. Co.***, 164 Wis. 2d 1, 8-9, 473 N.W.2d 160 (Ct. App. 1991). We need not resolve the apparent discrepancy because we conclude that the result is the same regardless of whether we defer to the trial court's decision.

[1] The trial court also rejected American Family's argument that Rhonda Neff's injuries occurred while Schiesl was engaged in his business pursuit and were therefore excluded under the terms of the policy. American Family cross-appeals that decision. Because we affirm the trial court's conclusion that American Family was prejudiced by Schiesl's untimely notice, we need not review the issue raised in the cross-appeal.

¶3 Schiesl was present when an elevator cable broke resulting in injury to Rhonda Neff. He helped transfer her to the ambulance. He waited almost two years after the accident and more than six months after he became a party to this lawsuit before he notified American Family. [Schiesl failed to comply with the provisions of the insurance policy that required that he give prompt notice of the accident.] Under WIS. STAT. § 632.26(2) (1997-98), this delay in complying with the notice provisions in the policy is presumptively prejudicial. *See* ***Gerrard Realty Corp. v. American States Ins. Co.***, 89 Wis. 2d 130, 146-47, 277 N.W.2d 863 (1979).

¶4 The Neffs have not presented sufficient evidence to rebut the presumption of prejudice. Schiesl's failure to promptly notify American Family of the accident and the lawsuit deprived American Family of its right to aggressively protect itself and its insured by independently talking to witnesses and investigating the case. The Neffs argue that American Family did not identify any evidence that was lost or altered as a result of the delay. They argue that there is no evidence that the result of an investigation would have been any different had the matter been investigated immediately after the accident. This argument fails because it ignores the presumption of prejudice resulting from the delay. The burden is not on American Family to show that evidence was lost or altered. Rather, the burden is on the Neffs to establish the lack of prejudice. Placing the burden of persuasion on the appropriate parties is vital because of the inherent difficulties in proving whether the results of the investigation may have been compromised by the passage of time.

¶5 The Neffs argue that American Family had the benefit of an investigation conducted by another defendant. That investigation was conducted by a claims service employee with two and one-half years experience who had no

expertise in elevator accidents. The investigator conducted brief interviews, failed to inspect or photograph all of the relevant areas, and focused his attention on the business relationships between the various defendants rather than the nature and cause of the accident. By the time American Family was informed of the accident, the friendships between the defendants had deteriorated, they had retained lawyers who advised them not to talk to investigators, and the critical time for investigation before the parties assumed a defensive posture had passed. Schiesl had submitted to questioning without an attorney present, denying American Family the opportunity to advise him to assume the same defensive posture as the other defendants. Under the circumstances, the Neffs have not overcome the presumption that American Family was prejudiced by Schiesl's late notice.

By the Court.—Judgment affirmed. Costs to the respondent on appeal. No costs on the cross-appeal.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).